IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 191 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HARMANCHAND CHUNILAL SHAH

Versus

STEP BY STEP

Appearance:

MR ASHOK K PADIA for Petitioner

MR MRUGEN K PUROHIT for Respondent No. 1

NOTICE SERVED for Respondent No. 2, 3, 4, 5

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 19/01/2001

ORAL JUDGEMENT

1. The petitioner herein had instituted a suit, being Summary Civil Suit No.1068 of 1993, for recovery of certain amounts from the present opponents. In the said suit, it seems, conditional leave was granted to the

defendants, but since the defendants had not complied with the condition, ultimately decree was passed. On the basis of the said decree, the petitioner filed Execution Application and, ultimately, has recovered the amount from the original defendants. The present opponents herein thereafter filed an application, being Civil Miscellaneous Application No.759 of 1995, by resorting to the provisions of Order 37 Rule 4 for setting aside ex parte decree. According to the applicants of that application, i.e. the present opponents herein, they appeared in the said suit through their Advocate and they had filed their leave to defend application and had denied the whole transaction between the parties. I am not concerned with the merits of such averments in that application. However, considering the facts and circumstances of the case, the learned Judge came to the conclusion that the applicants (present opponents herein) were never informed about the passing of the conditional order, and that it was a fit case for setting aside the ex parte decree. The learned trial Judge also came to the conclusion that the original order of conditional leave was for Rs.4,500/- and, in that view of the matter, even though the entire amount of Rs.15,000/-, as decreed in the suit is deposited by the defendants, they are entitled to refund of Rs.11,397/-. On the aforesaid basis, the application for setting aside ex parte decree was allowed by the learned trial Judge and ex parte decree passed in Summary Civil Suit No.1068 of 1993, was set aside. It was ordered that the plaintiff is entitled to withdraw Rs.4,500/- on furnishing security and that the remaining amount of Rs.11,397/-, which was lying in the court, was ordered to be refunded to the defendants of the suit.

2. The aforesaid order of the trial court is challenged in the present revision application at the instance of the original plaintiff of the suit who was opponent in that application.

3. At the time of admitting this Revision Application, by way of interim relief, this Court (Coram : Y.B. Bhatt, J.) permitted the present petitioner to withdraw the total amount of Rs.15,897/-, which was lying in the executing court, on furnishing security to the satisfaction of the trial court. In view of the aforesaid order, Mr.Padia for the petitioner / original plaintiff states that his client has already taken away the entire amount by furnishing appropriate security to that effect. In view of that position, now it is not possible to reverse the situation as the plaintiff has already taken away the amount since long. Mr.Purohit,

appearing for the opponents, states that, at the most, the present petitioner could have withdrawn only Rs.4,500/- for which conditional leave was granted and that the aforesaid order of the trial court is not required to be interfered with in this Revision Application, which is filed purely against the discretionary order of the trial court, by which the learned Judge has set aside the ex parte decree. Prima facie, the aforesaid argument of Mr.Purohit appears to be attractive. However, in view of the fact that this Court has allowed the original plaintiff to withdraw the entire amount by furnishing security, no useful purpose would be served now to change the said situation. The order which could be passed now in view of the aforesaid facts is that in case the suit of the plaintiff is dismissed, he will refund the amount to the defendants, which he has already withdrawn in pursuance of the interim order of this Court. No party can take advantage of the interim orders, as, ultimately, they have to abide by the final decision in the proceedings. Even otherwise, if the suit is dismissed, the defendants can recover the amount by taking appropriate proceedings. However, in order to see that the defendants may not have to suffer in case the suit is dismissed, I also direct the present petitioner to file an undertaking before the trial court within a period of two weeks from today to the effect that in case his suit is dismissed, he will refund the amount which he has taken away by virtue of the interim order of this Court. Mr.Padia has also assured that such undertaking will be filed to the effect that in case the suit is dismissed, the amount will be refunded to the other side which the petitioner has withdrawn by virtue of the interim order of this Court, subject, of course, to the right to take further recourse in accordance with law of challenging such decree. It is also clarified that the security given by the petitioner for withdrawing the decretal amount will continue to operate till the suit is disposed of by the learned City Civil Judge finally on merits. Since the petitioner has already withdrawn the amount by virtue of the interim order of this Court, it will not be proper at this stage to ask him to refund the said amount when the suit is yet to be adjudicated. Under these facts and circumstances of the case, therefore, this Revision Application is allowed partly to the aforesaid extent, as stated hereinabove, i.e. withdrawal of the amount in question by the petitioner without asking him to refund the said amount at this stage. Rest of the order of the trial court regarding setting aside the ex parte decree is confirmed in this Revision Application. It is needless to say that the withdrawal of the amount by the plaintiff herein will be

subject to the final outcome of the said suit and, as stated earlier, the security given for withdrawing the amount in question will continue to operate till the suit is finally adjudicated by the trial court. Before taking up the suit, the trial court shall also ensure that the undertaking is filed by the plaintiff, as stated in the earlier part of this Order.

This Revision Application is partly allowed accordingly. Rule is made absolute to the aforesaid extent, with no order as to costs.

19th January, 2001 (P.B. Majmudar, J.)

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(apj)